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# The Politics of Religion: Reasonable Accommodations and the Establishment Clause an Analysis of the Workplace Religious Freedom Act

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# THE POLITICS OF RELIGION: “REASONABLE ACCOMMODATIONS” AND THE ESTABLISHMENT CLAUSE AN ANALYSIS OF THE WORKPLACE RELIGIOUS FREEDOM ACT

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## I. INTRODUCTION

Early in life, one discovers that there are two topics to be avoided in “civilized” conversation—politics and religion; in fact, their blood-boiling effects are outdone by only one other topic—the *politics of religion*. Although many argue that little, if any, “civilized” conversation occurs on Capitol Hill, few can dispute the fact that the *politics of religion* have been the center of many Congressional debates in recent years. For example, in June of 1998, Congress, by joint resolution, proposed an amendment to the United States Constitution aimed at restoring religious freedom.<sup>1</sup>

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<sup>1</sup>Constitutional Amendment Restoring Religious Freedom, H.R.J. Res. 78, 105th Cong. (1998); 144 CONG. REC. H4078-04 (daily ed. June 4, 1998).

Likewise, the House passed the International Religious Freedom Act of 1998.<sup>2</sup> Previously, in 1993, the Religious Freedom Restoration Act was signed into law to prevent government from substantially burdening an individual's free exercise of religion.<sup>3</sup> Finally, for more than four years, both Houses of Congress have been proposing an amendment to Title VII of the Civil Rights Act of 1964<sup>4</sup> in the form of the Workplace Religious Freedom Act (WRFA).<sup>5</sup>

The Workplace Religious Freedom Act is the focus of this note.<sup>6</sup> The Workplace Religious Freedom Act represents another Congressional attempt to fortify the "reasonable accommodations" and "undue hardship" standards of Title VII with regard to religious discrimination in the workplace;<sup>7</sup> the WRFA does so in the face of Supreme Court decisions which have narrowed the scope of those standards,<sup>8</sup> eased burdens on employers, and valiantly guarded the citadel of the First Amendment's Establishment Clause.<sup>9</sup>

Specifically, this note will analyze the potential constitutional infirmity of the Workplace Religious Freedom Act in light of Establishment Clause jurisprudence and the Court's rather murky guidance on the constitutionality of existing Title VII standards. The Establishment Clause concerns created by the WRFA must be considered seriously because the aforementioned religious air on Capitol Hill assures that the WRFA will be resurrected in the 106th Congress. This note ultimately suggests that the WRFA distorts the meaning of "accommodation," places too great a burden on employers, and disproportionately raises religious interests above secular

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<sup>2</sup>H.R. 2431, 105th Cong. (1998); 144 CONG. REC. H3294 (daily ed. May 14, 1998).

<sup>3</sup>Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993). The Religious Freedom Restoration Act of 1993 had been codified at 42 U.S.C. §§ 2000bb-4 (1994), but the law was held unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>4</sup>42 U.S.C. § 2000e-2 (1998); *see also* 42 U.S.C. § 2000e(j) (giving the definition of "religion").

<sup>5</sup>*See* S. 1124, 105th Cong. (1997) (Version 2); *see also* S. 92, 105th Cong. (1997) (Version 1); H.R. 2948, 105th Cong. (1997). Apparently, Hon. Jerrold Nadler of New York introduced the Workplace Religious Freedom Act in 1994. *See* 140 CONG. REC. E2157-01, (daily ed. Oct. 6, 1994). Also, House Bill 2948 was reintroduced into the House by Hon. William F. Goodling of Pennsylvania on Tuesday, January 27, 1998. *See* 144 CONG. REC. E4-02 (1998).

<sup>6</sup>This note will analyze the 1997 Senate Version 2 of WRFA.

<sup>7</sup>42 U.S.C. § 2000e(j). Under Title VII, the term "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*

<sup>8</sup>*See* *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977) (holding that bearing more than a *de minimis* cost to accommodate an employee's religious needs constitutes an undue hardship on the employer); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986) (holding that an employer is not required to adopt the reasonable accommodation that is most beneficial to the employee).

<sup>9</sup>"Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

economic concerns of the workplace—all of which add up to a losing battle on the Establishment Clause front.

While not discounting the importance of religious observance in everyday life, this note concludes that Title VII should be left as is, and that, perhaps, the interests of religious observers—especially Sabbatarians—could be bolstered under the auspices of other existing, and more broadly-based, labor and employment legislation.

## II. EVOLUTION OF TITLE VII

Title VII of the Civil Rights Act of 1964, as originally enacted, prohibited employers from failing or refusing to hire, from discharging, and from discriminating against any individual regarding compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.<sup>10</sup> However, the 1964 version of Title VII did not include the "reasonable accommodations" requirement for employers which exists in the current form.<sup>11</sup> "Reasonable accommodations" evolved out of guidelines enacted by the Equal Employment Opportunity Commission (EEOC).<sup>12</sup> In 1966, the EEOC first

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<sup>10</sup>Title VII—Equal Employment Opportunity, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2). Title VII of the Civil Rights Act of 1964 stated, in part, the following:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.*

<sup>11</sup>*Id.* at §§ 701-703; *see also supra* note 7.

<sup>12</sup>The Equal Employment Opportunity Commission, as originally established, was given power with regard to the following:

(1) to cooperate with and, with their consent, utilize regional, state, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witnesses and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

Pub. L. No. 88-352, § 705, 78 Stat. 241, 258-59 (1964) (codified at 42 U.S.C. § 2000e-4).

promulgated guidelines requiring employers to accommodate the religious practices of employees unless such accommodation would create a “serious inconvenience to the conduct of the business.”<sup>13</sup> One year later, the EEOC revised its guidelines excusing the reasonable accommodation only if the employer could prove an “undue hardship.”<sup>14</sup>

The work of the Equal Employment Opportunity Commission was frustrated somewhat, in 1970, when the United States Court of Appeals for the Sixth Circuit, in *Dewey v. Reynolds Metals Co.*, expressed the opinion that the EEOC guidelines were not consistent with the purposes of the 1964 Act to the extent that they compelled an employer to accommodate the religious beliefs of another.<sup>15</sup> The Supreme Court affirmed the decision of the Sixth Circuit on other grounds, but because the judgment was entered by an equally divided Court it was not “entitled to precedential weight.”<sup>16</sup> However, the authority of the EEOC was further questioned in *Riley v. Bendix Corp.*<sup>17</sup> Referencing the fact that the 1967 EEOC guidelines required the employer to bear the burden of proof in establishing undue hardship, the *Riley* court stated the following:

We do not believe that the Commission is vested with the authority of determining the procedural question of burden of proof . . . . [W]e feel it would be unreasonable and impractical to require the complex American business structure to prove why it cannot gear itself to the ‘varied religious practices of the American people.’<sup>18</sup>

Congress immediately responded to the *Dewey* and *Riley* opinions by passing the 1972 amendment to Title VII which incorporated the 1967 EEOC guidelines excusing “reasonable accommodations” in the face of “undue hardship.”<sup>19</sup>

Although “undue hardship” is the standard on which employer compliance hinges, the standard went undefined in the 1972 amendment. Accordingly, the Supreme Court shaped the Title VII landscape by its decisions.

The seminal decision in Title VII religious discrimination litigation is *Trans World Airlines v. Hardison*.<sup>20</sup> In *Hardison*, the Court held that an “undue hardship” exists if an employer is required to bear more than a *de minimis* cost to provide a

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<sup>13</sup>Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(a)(2) (1966).

<sup>14</sup>Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(a)(2) (1967).

<sup>15</sup>429 F.2d 324, 331 n.1 (6th Cir. 1970), *aff’d by an equally divided Court*, 402 U.S. 689 (1971). The Sixth Circuit actually held, in part, that the employer had made a reasonable accommodation by allowing the employee to obtain a replacement for his shift, thus making it possible for him to observe a Sunday Sabbath. *Id.* at 331.

<sup>16</sup>*Neil v. Biggers*, 409 U.S. 188, 192 (1972).

<sup>17</sup>330 F. Supp. 583 (M.D. Fla. 1971).

<sup>18</sup>*Id.* at 588-89.

<sup>19</sup>*See* 118 CONG. REC. 705-31 (daily ed. Jan. 21, 1972); *see also supra* note 7.

<sup>20</sup>432 U.S. 63 (1977).

reasonable accommodation.<sup>21</sup> Displeasure with the Court's low *de minimis* standard was immediate as Justice Marshall, joined by Justice Brennan, wrote in dissent:

[The] decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not really mean what they say.<sup>22</sup>

Essentially, many feel that the Court's decision did nothing more than invalidate and ignore the intent of the Act and trivialize protections offered to religiously-dedicated employees.<sup>23</sup>

Nearly ten years after *Hardison*, the Supreme Court again narrowed the scope of the employer's duty under Title VII in *Ansonia Board of Education v. Philbrook*.<sup>24</sup> In *Philbrook*, the Court reversed a portion of a decision of the United States Court of

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<sup>21</sup>*Id.* at 84. *Hardison* was a clerk in the Stores Department at TWA who sought Saturdays off in order to observe the Sabbath of his chosen religion—the Worldwide Church of God. *Id.* at 66-67. After participating in a temporary “shift swap,” *Hardison* received an intra-company transfer, but, as a result, lost seniority rights under the collective bargaining agreement which had previously allowed him to bid for, and easily obtain, Saturday-free shifts. *Id.* at 68. *Hardison* was eventually discharged for insubordination after refusing to show up for scheduled Saturday shifts. *Id.* at 68-69.

In reaching its decision, the Court was adamant about protecting the integrity of the collective bargaining agreement in place at TWA. *Id.* at 81. The Court stated that:

It would be anomalous to conclude that by “reasonable accommodation” Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. *Id.*

<sup>22</sup>*Id.* at 86-87.

<sup>23</sup>See Alan D. Schuchman, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745, 761 (1998) (suggesting that by setting the *de minimis* standard, the *Hardison* Court “read the adjective ‘undue’ out of the Act.”); see also Sonny Franklin Miller, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789, 799 (1997) (suggesting that “undue hardship” analysis in religious accommodation claims amounts to nothing more than a “hypothetical protection”).

<sup>24</sup>479 U.S. 60 (1986). *Philbrook* was a high school teacher in Ansonia, Connecticut, and, as a member of the Worldwide Church of God, missed approximately six school days per year for observance of religious holy days. *Id.* at 62-63. Under the collective bargaining agreement between the Board and teacher's union, three days of paid leave was annually provided for observance of mandatory religious holidays. *Id.* at 63-64. An additional three days could be taken for “necessary personal business,” but this was understood not to include religious observance. *Id.*

For a time, *Philbrook* used “personal” days for religious purposes and his pay was accordingly reduced for such unauthorized leave. *Id.* at 64-65. While indicating that the school board policy requiring *Philbrook* to take unpaid leave for holy day observance was probably reasonable, the Court remanded the case for factual findings on whether paid leave was provided for all purposes except religious ones. *Id.* at 70-71.

Appeals for the Second Circuit that an employer must choose the reasonable accommodation that is preferred by, and most beneficial to, the employee.<sup>25</sup> In its opinion, the Court clarified that “where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end . . . [and] the employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.”<sup>26</sup> Again, as he had done in *Hardison*, Justice Marshall led the charge in dissent, expounding that an employer’s duty to accommodate should include consideration of the employee’s proposals if the employer is unable to fully resolve the conflict with his own proposals.<sup>27</sup>

Characteristic of its early involvement in Title VII affairs, the EEOC enacted aggressive guidelines in response to both the *Hardison* and *Philbrook* decisions. Although the EEOC held the line on the *de minimis* threshold in terms of “undue hardship,” it factored into the equation “the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will . . . need a particular accommodation.”<sup>28</sup> Likewise, the guidelines mandate that employers implement the accommodation which least disadvantages the employee, in those cases where multiple accommodations exist which would not cause undue hardship.<sup>29</sup> Still, because EEOC guidelines are sometimes not accorded great weight in Court decisions,<sup>30</sup> the most effective way to “restore . . . the original intent of Title VII’s protections for religious observances and practices,” is through legislation.<sup>31</sup>

However, any governmental undertaking promoting affirmative action in the name of religion must first be found to be constitutionally “pure,” for the First Amendment espouses the principle that “Congress shall make no law respecting an establishment of religion . . . .”<sup>32</sup> By its very nature, Title VII warrants criticism as a law “establishing religion” because it requires private employers to accommodate, and arguably to provide preferential treatment for, religious observers.<sup>33</sup> As one commentator has suggested, “the statute . . . clearly has the nonsecular objective of

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<sup>25</sup>*Id.* at 68-69.

<sup>26</sup>*Id.* at 68.

<sup>27</sup>*Id.* at 72-73.

<sup>28</sup>29 C.F.R. § 1605.2(e)(1) (1998); 29 C.F.R. § 1605.2(e)(1) (1996).

<sup>29</sup>29 C.F.R. § 1605.2(c)(2)(ii) (1998); 29 C.F.R. § 1605.2(c)(2)(ii) (1996).

<sup>30</sup>*See Philbrook*, 479 U.S. at 69 n.6 (noting that EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law).

<sup>31</sup>To Amend Title VII of the Civil Rights Act of 1964 to Establish Provisions With Respect to Religious Accommodation in Employment, and for Other Purposes: Hearings on S. 1124 Before the Comm. on Labor and Human Resources United States Senate, 105th Cong. 1 (1997) [hereinafter *Hearings*] (opening statement of Senator Coats).

<sup>32</sup>U.S. CONST. amend. I.

<sup>33</sup>*See* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 225 (Paul W. Cane Jr. ed., American Bar Ass’n 3d. ed. 1996).

improving the employment position of religious employees, rather than improving the status of all employees, religious or nonreligious.”<sup>34</sup>

Interestingly enough, the Supreme Court of the United States, as a whole, has had little to say definitively regarding the constitutionality of Title VII’s “reasonable accommodations” provision. Nevertheless, lower courts and individual Supreme Court members have commented on the subject sparingly. Interpreting the significance of what each has said necessitates an inquiry into Establishment Clause jurisprudence.

### III. TITLE VII AND THE ESTABLISHMENT CLAUSE

The fundamental test employed in Establishment Clause challenges was fleshed out by the Supreme Court in *Lemon v. Kurtzman*.<sup>35</sup> In *Lemon*, the Court held that two state statutes<sup>36</sup> violated the Establishment Clause because they provided state aid to church-related elementary and secondary schools, in part, by reimbursing the cost for teachers’ salaries and secular textbooks.<sup>37</sup> The *Lemon* Court determined that in order for a statute to remain consistent with the Establishment Clause, it must comply with each of the following: 1) the statute must have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive entanglement with religion.<sup>38</sup> While the Court found that both state statutes complied with the first two prongs of the test, it held that continual monitoring of teacher performance and method—so as to ensure that religious tenets were not being blended into secular subjects—would involve excessive entanglement between church and state.<sup>39</sup>

The *Lemon* test figured prominently in one of the earliest challenges to Title VII’s “reasonable accommodations” provision—*Cummins v. Parker Seal Co.*<sup>40</sup> Cummins was an employee who was fired for refusing to work on Saturday, which was the Sabbath of his chosen religion of the Worldwide Church of God.<sup>41</sup> In

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<sup>34</sup>Ronald W. Eades, *Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion*, 5 U. DAYTON L. REV. 59, 72 (1980); see also *Cummins v. Parker Seal Co.*, 516 F.2d 544, 558 (6th Cir. 1975) (Celebrezze, J., dissenting) (stating, in part, that the religious accommodation requirement of Title VII discriminates between religion and non-religion), *aff’d by an equally divided Court*, 429 U.S. 65 (1976).

<sup>35</sup>403 U.S. 602 (1971).

<sup>36</sup>The statutes in question were the products of the Pennsylvania and Rhode Island legislatures. *Id.* at 606.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 612-13.

<sup>39</sup>403 U.S. at 613-19.

<sup>40</sup>516 F.2d 544 (6th Cir. 1975), *aff’d by an equally divided Court*, 429 U.S. 65 (1976), *judgment vacated by* 433 U.S. 903 (1977). Note that the Sixth Circuit in *Cummins* actually cites *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), for its Establishment Clause test, but the test is unquestionably the one that evolved from *Lemon*. See 516 F.2d at 551-52.

<sup>41</sup>516 F.2d at 545. Cummins filed a charge of religious discrimination with the Equal Employment Opportunity Commission (EEOC) and a complaint with the Kentucky Commission on Human Rights (KCHR). *Id.* The KCHR originally found that the employer’s



passing on the constitutionality of Title VII, the Sixth Circuit held that Title VII had the adequate secular purpose of preventing discrimination in employment.<sup>42</sup> Comparing Title VII to the statute allowing conscientious objector exemption, the court stated that “the reasonable accommodation rule reflects a legislative judgment that . . . certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience.”<sup>43</sup> With regard to the second prong of the test, the court held that Title VII neither advanced nor inhibited religion, in part, because it did not mandate financial support for religious institutions.<sup>44</sup> Furthermore, the court stated that according to the Supreme Court, “a law is not necessarily unconstitutional merely because it confers incidental or indirect benefits upon religious institutions.”<sup>45</sup> Finally, the court did not find excessive entanglement fostered by Title VII because it required little or no contact between religious institutions and governmental entities.<sup>46</sup> The court emphasized: “[T]he EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any governmental entanglement with religion.”<sup>47</sup>

Although the Supreme Court affirmed the holding of the Sixth Circuit, it did so by an equally divided Court.<sup>48</sup> In addition, the Supreme Court later vacated the judgment and remanded in light of its decision in *Hardison*.<sup>49</sup> Based on the *Hardison* decision, the Sixth Circuit, on remand, affirmed the original decision of the United States District Court for the Eastern District of Kentucky and dismissed Cummins’s complaint.<sup>50</sup> Thus, Title VII’s constitutional status remanded in limbo.

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attempts to accommodate Cummins’s religious needs resulted in undue hardship to the employer and it dismissed the complaint. *Id.* at 545-46. Cummins subsequently filed an action in the United States District Court for the Eastern District of Kentucky. *Id.* Based on the factual record developed before the KCHR, the district court held that the employer was justified in discharging Cummins and it dismissed the complaint. *Id.* at 546. The United States Court of Appeals for the Sixth Circuit subsequently reversed the district court, finding no substantial evidence in the record to support the conclusion that making the accommodation would cause undue hardship. 516 F.2d at 550. Moreover, the Sixth Circuit dispensed with a constitutional challenge to Title VII’s “reasonable accommodations” requirement, holding that it did not violate the Establishment Clause. *Id.* at 552-53.

<sup>42</sup>*Id.* at 552. The Sixth Circuit relied on the remarks of Senator Randolph, the sponsor of the 1972 Amendment to the Civil Rights Act of 1964, that it was his desire “to assure that freedom from religious discrimination in the employment of workers [was] for all time guaranteed by law.” *Id.* (citing 118 CONG. REC. 705 (1972)).

<sup>43</sup>*Id.* at 552-53.

<sup>44</sup>*Id.* at 553.

<sup>45</sup>*Id.* (citation omitted).

<sup>46</sup>*Cummins*, 516 F.2d at 553.

<sup>47</sup>*Id.* at 553-54.

<sup>48</sup>See *supra* note 16 and accompanying text.

<sup>49</sup>*Parker Seal Co. v. Cummins*, 433 U.S. 903 (1977).

<sup>50</sup>*Cummins v. Parker Seal Co.*, 561 F.2d 658-59 (6th Cir. 1977).

Still, over the next ten years, several Supreme Court Justices hinted at the constitutionality of Title VII's "reasonable accommodations" feature. For instance, Justice Marshall, joined by Justice Brennan, stated outright that "I think it beyond dispute that [Title VII] does and, consistently with the First Amendment, can require employers to grant privileges to religious observers as part of the accommodation process."<sup>51</sup> Additionally, Marshall expressed the view that "the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of 'sponsorship, financial support, and active involvement of the sovereign in religious activity' against which the Establishment Clause is principally aimed."<sup>52</sup> Similarly, Justice O'Connor subsequently explained:

[A] statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance . . . an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.<sup>53</sup>

The "absolute accommodation," from which Justice O'Connor tried to distinguish Title VII, was a standard the Court reviewed in *Thornton v. Caldor, Inc.*<sup>54</sup> *Thornton* involved a Connecticut statute that prohibited an employer from requiring an employee to work on a day of the week that the employee observed as his chosen Sabbath.<sup>55</sup> Resorting to the *Lemon* test, the Court held that the statute violated the Establishment Clause because it created an "unyielding weighting in favor of Sabbath observers over all other interests"<sup>56</sup> and, thus, went "beyond having an incidental or remote effect of advancing religion."<sup>57</sup> The Court placed particular emphasis on the manner in which the statute mandated that religious interests control over the secular interests of the workplace and on the fact that the statute lacked exceptions; for example, the statute gave no consideration to the burdens placed on the employer or co-employees or to whether the employer had proposed any reasonable accommodations.<sup>58</sup>

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<sup>51</sup>Trans World Airlines v. Hardison, 432 U.S. 63, 91 (1977) (Marshall, J., dissenting).

<sup>52</sup>*Id.* at 92 n.4 (Marshall, J., dissenting)(citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

<sup>53</sup>*Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

<sup>54</sup>*Id.* at 703.

<sup>55</sup>*Id.* at 704-05.

<sup>56</sup>*Id.* at 710.

<sup>57</sup>*Id.*

<sup>58</sup>472 U.S. at 709-10.

Thus, in addition to *Cummins*, and a group of other lower court decisions upholding the constitutionality of Title VII's "reasonable accommodations,"<sup>59</sup> the *Thornton* decision, and especially O'Connor's concurring opinion, seemed to solidify the otherwise precarious Establishment Clause ground on which Title VII stood.<sup>60</sup> Specifically, it delineated the dichotomy of permissible and impermissible accommodations for religion: reasonable, but not absolute. One scholar noted the dichotomy while calling for and proposing changes to Title VII:

[B]arring a requirement of absolute accommodation . . . a standard more protective of employees than the *de minimis* standard would not seem to violate the Establishment Clause. The Court could have measured undue hardship against a reasonable-costs standard or arguably even against a significant-expense standard, like that of the ADA, and still met the requirements of the *Lemon* test.<sup>61</sup>

#### IV. THE WORKPLACE RELIGIOUS FREEDOM ACT

In 1997, Congress introduced an amendment to 42 U.S.C. § 2000e entitled the Workplace Religious Freedom Act (WRFA).<sup>62</sup> In general, the WRFA proposed the

<sup>59</sup>See *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottelson v. Smith Steel Workers D.A.L.U.*, 643 F.2d 445 (7th Cir. 1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098.

<sup>60</sup>See *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129 (3d. Cir. 1986), *cert. denied*, 479 U.S. 972; *EEOC v. Jefferson-Smurfit Corp.*, 724 F. Supp. 881 (M.D. Fla. 1989).

<sup>61</sup>Schuchman, *supra* note 23, at 758-59; see also Miller, *supra* note 23, at 791 (proposing that incorporation of the 1996 EEOC guidelines into Title VII, taking into account "the identifiable cost in relation to the size and operating cost of the employer" and "the number of individuals needing the accommodation" would be constitutional in the face of Establishment Clause scrutiny).

<sup>62</sup>See *supra* notes 5-6. The text of S. 1124, 105th Cong. (1997), is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

##### SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Religious Freedom Act of 1997."

##### SECTION 2. AMENDMENTS.

(a) DEFINITIONS—Section 701(j) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(j)) is amended—

- (1) by inserting "(1)" after "(j)";
- (2) by inserting " , after initiating and engaging in an affirmative and bona fide effort," after "unable";
- (3) by striking "an employee's" and all that follows through "religious" and insert "an employee's religious"; and
- (4) by adding at the end the following:

"(2) As used in this subsection, the term 'employee' includes a prospective employee.

"(3) As used in this subsection, the term 'undue hardship' means an accommodation requiring significant difficulty or expense. For purposes of determining whether an accommodation requires significant difficulty or expense—

"(A) an accommodation shall be considered to require significant difficulty or expense if the accommodation will result in the inability

of an employee to perform the essential functions of the employment position of the employee; and

“(B) other factors to be considered in making the determination shall include—

“(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

“(ii) the number of individuals who will need the particular accommodation to a religious observance or practice; and

“(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.”

(b) EMPLOYMENT PRACTICES—Section 703 of such Act (42 U.S.C 2000e-2) is amended by adding at the end the following:

“(o)(1) As used in this subsection:

“(A) The term ‘employee’ includes a prospective employee.

“(B) The term ‘leave of general usage’ means leave provided under the policy or program of an employer, under which

“(i) an employee may take leave by adjusting or altering the work schedule or assignment of the employee according to criteria determined by the employer; and

“(ii) the employee may determine the purpose for which the leave is to be utilized.

“(C) The term ‘undue hardship’ has the meaning given the term in section 701(j)(3).

“(2) For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an employee, an accommodation by the employer shall not be deemed to be reasonable if such accommodation does not remove the conflict between employment requirements and the religious observance or practice of the employee.

“(3) An employer shall be considered to commit such a practice by failing to provide such a reasonable accommodation for an employee if the employer refuses to permit the employee to utilize leave of general usage to remove such a conflict solely because the leave will be used to accommodate the religious observance or practice of the employee.

“(4) It shall not be a defense to a claim of unlawful employment practice under this title for failure to provide a reasonable accommodation to a religious observance or practice of an employee that such accommodation would be in violation of a bona fide seniority system if, in order for the employer to reasonably accommodate such observance or practice —

“(A) an adjustment would be made in the employee’s work hours (including an adjustment that requires the employee to work overtime in order to avoid working at a time that abstention from work is necessary to satisfy religious requirements), shift, or job assignment, that would not be available to any employee but for such accommodation; or

“(B) the employee and any other employee would voluntarily exchange shifts or job assignments, or voluntarily make some other arrangement between the employees.

“(5)(A) An employer shall not be required to pay premium wages or confer premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if work is performed during such hours only to accommodate religious requirements of an employee.

following changes to Title VII: 1) defining “undue hardship” to mean an accommodation requiring “significant difficulty or expense,” thus adopting the Americans with Disabilities Act definition and effectively nullifying the Supreme Court’s *de minimis* standard established in *Hardison*; 2) determining if “significant difficulty or expense” exists based on if the accommodation results in the inability of an employee to perform the essential functions of the employment position and also by considering the identifiable cost to the employer, the number of individuals needing the particular accommodation, and any added difficulty that would be involved by the geographic separateness or administrative or fiscal relationship of multiple work facilities; (3) requiring that for an accommodation to be considered “reasonable” the employer must remove the conflict between employment requirements and the religious observance or practice of the employee; (4) prohibiting an employer from preventing an employee from utilizing “general leave” to accommodate the employee’s religious observance, thus clarifying a similar scenario discussed in *Philbrook*; (5) prohibiting an employer from using as a defense the claim that an accommodation would violate a bona fide seniority system if an adjustment would be made in the employee’s work hours, shift, or job assignment (that would not be available to any employee but for such accommodation), or if the employees could make voluntary arrangements for shift or job swaps.<sup>63</sup>

In co-sponsoring the legislation, Senator Kerry of Massachusetts articulated that “the Workplace Religious Freedom Act represents our effort to try to create the proper balance between [Government prohibitions against] establishment of religion [and] . . . the curtailing of religious observances.”<sup>64</sup> Unfortunately, the good Senator may have contributed to tipping Title VII’s scales too far in favor of establishment, prompting one person to testify before the Senate Committee on Labor and Human Resources that “the severest test for [The Workplace Religious Freedom Act] will be the Constitution and not particular quibbles about the statutory language.”<sup>65</sup> Notwithstanding indications that existing Title VII formulations are constitutional,<sup>66</sup>

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“(B) As used in this paragraph—

“(i) the term ‘premium benefit’ means an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, an educational benefit, or a pension, that is greater than the employment benefit due the regular work schedule of the employee; and

“(ii) the term ‘premium wages’ includes overtime pay and compensatory time off, premium pay for night, weekend, or holiday work, and premium pay for standby or irregular duty.”

#### SECTION 3, EFFECTIVE DATE; APPLICATION OF AMENDMENTS

(a) EFFECTIVE DATE—Except as provided in subsection (b), this Act and the amendments made by Section 2 take effect on the date of enactment of this Act.

(b) APPLICATION OF AMENDMENTS -- The amendments made by Section 2 do not apply with respect to conduct occurring before the date of enactment of this Act.

<sup>63</sup>See *supra* note 62.

<sup>64</sup>*Hearings, supra* note 31, at 2-3 (statement of Senator Kerry from Massachusetts).

<sup>65</sup>*Id.* at 65-66 (statement of Roberto L. Corrada, Professor, University of Denver College of Law, Denver, Co.).

<sup>66</sup>See *supra* text accompanying notes 32-61; see also Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1357 (1997) (suggesting that current Title VII would be constitutional based on general

this author submits that any future amendment to Title VII resembling the proposed Workplace Religious Freedom Act faces serious challenges on Establishment Clause grounds, either under the *Lemon* test or revisions of the *Lemon* test emphasizing “neutrality,”<sup>67</sup> “endorsement,”<sup>68</sup> or “coercion.”<sup>69</sup>

#### V. THE WORKPLACE RELIGIOUS FREEDOM ACT: NOTHING BUT A “LEMON”

Assuming that, as an anti-discrimination law, Title VII has a valid secular purpose, the WRFA passes muster under the first prong of the *Lemon* test. Assuming further that over thirty years of court interpretation of Title VII claims has been achieved without significant difficulty, the courts are not likely to become excessively entangled if the WRFA is enacted. However, there is a strong possibility that the WRFA could be struck down under *Lemon*’s second prong because it has the effect of advancing religion.

##### A. “Advancing Religion”

##### 1. De Minimis Is the Maximum

Conceptually, the low *de minimis* threshold stands as a monument to the Court’s desire to avoid Establishment Clause implications altogether in the Title VII arena,<sup>70</sup> and evidences a nonverbal warning that a higher threshold would constitutionally destroy an otherwise socially beneficial law. Even Justices Marshall and Brennan, who generally gave Title VII (in its current form) a passing constitutional grade,<sup>71</sup> and who criticized the *Hardison* majority for setting the *de minimis* standard, hinted that “important constitutional questions would be posed by interpreting [Title VII] to compel employers (or fellow employees) to incur substantial costs to aid the religious observer . . . .”<sup>72</sup>

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Supreme Court doctrines permitting the Government to take action tailored to protect individual religious freedom).

<sup>67</sup>See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994). Professor Corrada, of the University of Denver College of Law, actually commented before the Senate that if the Workplace Religious Freedom Act were an individual piece of legislation, it would clearly be held unconstitutional on Establishment Clause grounds. *Hearings*, *supra* note 31, at 66. However, he felt that as an amendment to Title VII, it would survive because Title VII, as an anti-discrimination law, has a valid secular purpose. *Id.* It is this author’s opinion that, regardless of its secular purpose, WRFA faces severe challenges under the second prong of the *Lemon* test.

<sup>68</sup>See *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (O’Connor, J., concurring).

<sup>69</sup>See *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

<sup>70</sup>See Schuchman, *supra* note 23, at 758; see also 1 LINDEMANN & GROSSMAN, *supra* note 33, at 231; *Hearings*, *supra* note 31, at 58 (statement of Lawrence Z. Lorber, employment discrimination lawyer with Verner, Liipfert, Bernhard, McPherson & Hand, Washington, D.C.) (commenting, respectively, that the Court set a low *de minimis* standard to avoid any Establishment Clause conflicts).

<sup>71</sup>See *supra* notes 51-52 and accompanying text.

<sup>72</sup>*Trans World Airlines v. Hardison*, 432 U.S. 63, 90-91 (1977) (Marshall, J., dissenting). Marshall also explicitly stated that he was not deciding the merits of any constitutional

Clearly, the “significant difficulty or expense” threshold, proposed in an amendment like the WRFA, would awaken the “sleeping Establishment Clause dog” that the *Hardison* Court preferred to let lie. An analogy to the Court’s decision in *Thornton* illustrates how this would occur.<sup>73</sup> One commentator has noted the following: “*Thornton* hints at [a] difficulty with the statutory ‘reasonable accommodation’ requirement. The Court’s opinion emphasized the burdens that Connecticut’s statute placed on employees and coworkers. That is, accommodation in this context pits religious interests against economic ones.”<sup>74</sup> While the *de minimis* interpretation of existing Title VII substantially reduces the degree to which Congress, and the government in general, is seen to have subordinated economic interests to religious ones,<sup>75</sup> the “significant burden or expense” threshold proposed boosts religious interests greatly above those of secular economic concerns by forcing employers to incur greater costs to accommodate religiously-dedicated employees. In other words, the enhanced standard would vault Title VII past the acceptable point of merely conferring an “incidental” or “indirect” benefit on religion.<sup>76</sup>

## 2. “Reasonable,” Unreasonably Advanced, Approaches “Absolute”

Elements of the Workplace Religious Freedom Act requiring an employer to “initiate . . . an affirmative and bona fide effort” to provide an accommodation<sup>77</sup> and to completely “remove the conflict” between employment requirements and the employee’s religious observance<sup>78</sup> threaten to transform the “reasonable” accommodations concept into a type of “absolute” accommodation.<sup>79</sup> Knowing, based on *Thornton*, that the Court would not view favorably any type of “absolute” threshold,<sup>80</sup> there are two ways in which an explicit mandate to “remove the conflict” too closely resembles an “absolute” accommodation. First, the WRFA distorts the meaning of “accommodation.” Second, the WRFA forces the employer into acquiescing to and implementing employee-proposed accommodations.

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objections that could be raised if Title VII were construed to require employers to assume significant costs in accommodating. *Id.* at 91 n.3.

<sup>73</sup>See *supra* text accompanying notes 54-58.

<sup>74</sup>Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1707 (1988).

<sup>75</sup>*Id.*

<sup>76</sup>See *supra* notes 44-45 and accompanying text.

<sup>77</sup>See S. 1124, 105th Cong. § 2(a)(2) (1997); see also *supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>78</sup>See S. 1124 § 2(b)(2); see also *supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>79</sup>See *Hearings*, *supra* note 31, at 49 (statement of Lawrence Z. Lorber, employment discrimination lawyer with Verner, Liipfert, Bernhard, McPherson & Hand, Washington, D.C.) (suggesting that removing the conflict resembles an absolute standard).

<sup>80</sup>See *supra* text accompanying notes 54-58.

a. "You Mean 'Accommodation' as in 'Compromise' . . . Right?"

Despite arguments by proponents of WRFA that "a reasonable accommodation has got to be an accommodation that lifts the conflict completely . . . or it is no accommodation at all,"<sup>81</sup> such arguments distort the meaning of the word "accommodation," connoting unilateral sacrifice on the part of the employer rather than mutual compromise by both parties.<sup>82</sup> Contrary to the articulation of Justice Stevens that when a duty to accommodate arises, the employer has a statutory duty to remove the conflict,<sup>83</sup> the courts have recognized that a "reasonable" accommodation can be, and often is, made short of complete conflict removal. For example, in *Dewey v. Reynolds Metals Co.*, the Sixth Circuit held that an employer had made a reasonable accommodation for a Sunday Sabbatarian through a neutral policy of allowing him the opportunity to secure a replacement for his Sunday shift.<sup>84</sup> The *Dewey* decision reflects the true nature of an "accommodation" as both parties shared the burden of conflict: the employer compromised by allowing the employee to seek a replacement, and the employee compromised by assuming the duty to find a replacement.

Conversely, under the Workplace Religious Freedom Act, it seems that if the employee was forced to share in the burden of conflict resolution, that a *Dewey* accommodation might not even qualify for consideration as "reasonable." Rather, the employer might have to allow for an employee replacement and also attempt to secure that replacement. Critics of the foregoing argument could point to the WRFA provision allowing for, and encouraging, voluntary job/shift swaps arranged by employees themselves.<sup>85</sup> But such critics can be answered on two counts. First, if WRFA intends for the employee to share in the removal of conflict, then language mandating that the employer "remove the conflict" is contradictory, unnecessary, and superfluous. Second, the aforementioned voluntary job/shift swap allowance falls under a provision prohibiting employers from upholding an otherwise valid collective bargaining agreement which might not favor such swaps.<sup>86</sup> Thus, WRFA constructively pushes "reasonable" into the realm of "absolute" by stripping the employer of discretion in business decisionmaking and, similar to the statute at issue in *Thornton*, forces the employer to "adjust [his] affairs to the command of the [Government] whenever the statute is invoked by the employee."<sup>87</sup> One practitioner

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<sup>81</sup>*Hearings*, *supra* note 31, at 66 (comment of Roberto L. Corrada, Professor, University of Denver College of Law, Denver, Co.).

<sup>82</sup>In common parlance, "accommodation" is understood as being synonymous with "compromise." See ROGET'S 21ST CENTURY THESAURUS 165 (1992). "To compromise" means "to bind by *mutual* agreement" or "to adjust or settle by partial *mutual* relinquishment of principles, position, or claims." See WEBSTER'S THIRD NEW INT'L DICTIONARY 468 (1971)(emphasis added).

<sup>83</sup>*Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 76 (1986) (Stevens, J., concurring).

<sup>84</sup>429 F.2d 325 (6th. Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

<sup>85</sup>See S. 1124, 105th Cong. § 2(b)(4)(B) (1997); see also *supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>86</sup>See S. 1124 § 2(b)(4)(B).

<sup>87</sup>*Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (emphasis added).



put it best when he testified before the Senate that “the essential concept of an ‘accommodation’ is for a means to be found to allow the co-existence of competing interests—not the elimination of either; [t]o eliminate the conflict means that the requested accommodation becomes a non-negotiable order.”<sup>88</sup>

Of course, it is undisputed that Title VII, by requiring an accommodation at all, gives to employers a non-negotiable order. However, the matter of *degree* is the important issue here, which, again, is what the Supreme Court implicitly said in *Hardison*. The more non-negotiable orders that an amendment like WRFA is seen to give employers in the name of religion, the more Title VII gets pushed toward an “absolute” burden—a constitutionally unacceptable *degree*.

Because the Supreme Court was equally divided in affirming *Dewey*, it attempted to solidify the concept of “accommodation” in *Philbrook*, considering an accommodation to be “reasonable” that would have required an employee to take unpaid leave for holy day observance.<sup>89</sup> Clearly, an accommodation allowing unpaid leave does not technically remove the conflict completely because the employee must still forfeit a portion of his salary for the time off.<sup>90</sup> Nevertheless, it “eliminates the conflict”<sup>91</sup> to the extent that it signifies a mutual compromise: one in which the employer allows the employee to freely observe his holy days without threat of job loss or discipline, and the employee rightly gives up compensation for a day he does not work.<sup>92</sup>

Additionally, the accommodation of “mutual” compromise<sup>93</sup>—one not always requiring complete conflict removal to the extent that the employee is burden-free—is the concept that the Court prefers. In *Philbrook*, the Court referenced the legislative history of the 1972 amendment to Title VII, adopting the view of its sponsor, Senator Randolph, that accommodations be made with “flexibility” and “a desire to achieve an adjustment.”<sup>94</sup> Likewise, the Court noted a decision of the United States Court of Appeals for the Fifth Circuit in which it was stated that “bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.”<sup>95</sup> Unfortunately, the strong, explicit language of the WRFA requiring that an employer “initiate . . . an affirmative and bona fide effort” to provide an accommodation which, to be reasonable, must “remove the conflict,” threatens to

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<sup>88</sup>*Hearings, supra* note 31, at 49 (statement of Lawrence Z. Lorber, employment discrimination lawyer with Verner, Liipfert, Bernhard, McPherson & Hand, Washington, D.C.).

<sup>89</sup>*Philbrook*, 479 U.S. at 70 (1986).

<sup>90</sup>*Id.* at 74 (Marshall, J., dissenting).

<sup>91</sup>*Id.* at 70.

<sup>92</sup>*Id.* The majority and dissenting opinions highlight the ambiguities inherent in the term “eliminate the conflict;” accordingly, I feel that any such language included in WRFA has the potential to be misinterpreted and will disproportionately burden the employer in the accommodation process.

<sup>93</sup>*See supra* note 82.

<sup>94</sup>*Philbrook*, 479 U.S. at 69 (citing 118 CONG. REC. 706 (1972)).

<sup>95</sup>*Id.* (quoting *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (1982)).

nullify a spirit of “bilateral cooperation” and impose a system of unilateral employer sacrifice.<sup>96</sup> Thus, the WRFA approaches the precipice of “religious advancement.”

*b. “Why Don’t You Just Tell Me Exactly What You Want!”*

The unilateralism of the obligation under the Workplace Religious Freedom Act is further evidenced by a reading of “removing the conflict” that requires the employer to implement the reasonable accommodation most beneficial to the employee; after all, some might argue that the conflict is not completely removed if the employee is denied the opportunity to have his burden reduced by actually selecting the accommodation. Such an intention is supported by two factors. First, Senate Version One of the WRFA included a subsection (separate from the subsection on “conflict removal” but incorporated into the same section on reasonable accommodation analysis) actually stating that an accommodation would not be considered “reasonable” if “the employee demonstrates to the employer the availability of an alternative accommodation less onerous to the employee that may be made by the employer without undue hardship on the conduct of the employer’s business.”<sup>97</sup> Second, the WRFA was introduced to “remedy decisions that have been made by the courts over a series of years that . . . have strayed from the original intent of Title VII.”<sup>98</sup> In *Philbrook*, the Court rejected a system under which the most “employee-beneficial” accommodation would have to be implemented.<sup>99</sup> Because the WRFA already clarifies the *Philbrook* decision in one other respect by ensuring that employees be permitted to use general leave to accommodate religious practices,<sup>100</sup> it is not unreasonable to conclude that the WRFA would seek to alter *Philbrook* with regard to employee-preferred accommodations. Accordingly, the final version of the WRFA, if enacted, is likely to include—either explicitly or subsumed into the duty of “conflict removal”—a requirement that an employer implement the reasonable accommodation preferred by the employee.

A requirement forcing the employer to implement the reasonable accommodation preferred by the employee slides the WRFA toward an “absolute” accommodation constitutionally forbidden under *Lemon*. For example, just as the Connecticut statute in *Thornton* gave the employee the power to unilaterally designate the Sabbath day for which he would be relieved of work,<sup>101</sup> the WRFA would effectively give the employee the power to unilaterally designate which accommodation the employer will implement. In other words, by placing power in the hands of the employee to propose and implement his own reasonable accommodation—one that is less onerous than the employer’s accommodation and which does not create an undue hardship—the WRFA theoretically nullifies the efforts of the employer, giving little,

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<sup>96</sup>See *supra* notes 77-78; see also *supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>97</sup>S. 92, 105th Cong. § 2(b)(2)(B)(i) (1997).

<sup>98</sup>Hearings, *supra* note 31, at 2 (opening statement by Senator Coats).

<sup>99</sup>*Philbrook*, 479 U.S. at 68-69.

<sup>100</sup>See *supra* note 24; see also S. 1124, 105th Cong. § 2(b)(3) (1997); see also *supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>101</sup>*Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985).

if any, consideration to his reasonable accommodations, and, yet again, stripping him of all discretion in business decisionmaking.<sup>102</sup>

Of course, the aforementioned argument must be annotated with the fact that the Court in *Philbrook* never referenced its *Thornton* decision of the previous year; the *Philbrook* Court found forced adoption of employee-preferred accommodations to be explicitly offensive to the plain meaning and legislative history of the 1972 amendment to Title VII rather than addressing any potential offensiveness to the Establishment Clause for “advancement” of religious principles.<sup>103</sup> However, this author believes that language employed by the Court in *Philbrook* supports the small leap into a *Lemon* analysis of the kind conducted in *Thornton*. In *Philbrook*, the Court described a system in which the employer would be forced to select the accommodation preferred by the employee as a system in which “the employee is given every *incentive to hold out* for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution to the conflict.”<sup>104</sup> This language can be directly reconciled with the concern of the Court in *Thornton*, and the idea previously illustrated in this note, that the more control that is given to the employee in the accommodation process, the less consideration is given to employer proposals, and the more the employer is “held hostage”—backed into a situation of acquiescence to the “unilateral” dictates of the religiously-minded employee.<sup>105</sup> Thus, the slippery slope of “absolute” accommodation begins, leading to disproportionate “advancement” of religious interests under the *Lemon* test.

c. “‘Absolute’ Means No Exceptions; the WRFA Has One . . . Does It Not?”

A strong argument can be advanced that the Workplace Religious Freedom Act does not force an “absolute” standard on employers because, regardless of whether the employer must present accommodations that “remove the conflict” or whether the employer must implement the accommodation preferred by the employee, the employer can still acquire exemption from accommodating in the face of “undue hardship.”<sup>106</sup> The problem with this argument is that, in addition to raising “undue hardship” to a level requiring “significant difficulty or expense,” the WRFA offers an ill-designed, “two-tiered” determination for what constitutes “significant difficulty or expense”—the first tier of which denies that “significant difficulty or expense” exists short of any accommodation making the employee unable to perform the essential functions of his position.<sup>107</sup> By so providing, Congress inadvertently

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<sup>102</sup>In *Thornton*, the Court commented that the Connecticut statute “[allowed] for no consideration as to whether the employer [had] made reasonable accommodation proposals.” *Id.* at 710.

<sup>103</sup>See *Philbrook*, 479 U.S. at 68-69.

<sup>104</sup>*Id.* at 69 (emphasis added).

<sup>105</sup>See text accompanying *supra* notes 101-102.

<sup>106</sup>Hearings, *supra* note 31, at 56 (statement of Roberto L. Corrada, Professor, University of Denver College of Law, Denver, Co.).

<sup>107</sup>I consider “tiers” one and two to consist of (A) and (B), respectively, of the following:

(A) an accommodation shall be considered to require significant difficulty or expense if the accommodation will result in the inability of an employee to perform the essential functions of the employment position of the employee; *and*

created a ridiculous and nearly impossible exemption for employers to obtain in certain situations. For instance, “tier one” implies that any leave of absence (the accommodation contemplated in *Hardison*) offered to an employee would be an “undue hardship” because during leave the employee could not perform any of the functions of his position; if this were true, an employer would always be excused from accommodating, thus nullifying the WRFA’s consideration of job swaps and transfers<sup>108</sup> and undermining the entire purpose of the WRFA in making it more difficult for employers to escape their duty to accommodate for religiously-dedicated employees.

Accordingly, for the WRFA to work, one must assume that the aforementioned paradox is not intended. But then how is an employer to know what accommodations create the “significant difficulty or expense” contemplated in “tier one?” (*i.e.*, if leave of absence does not, then what does?) Senator Coats indicated that job swaps are a part of the analysis and suggested that “if the employer can show that, say, this machinist performs this work, and the job swap that has been proposed or arranged involves someone not trained in that technicality, that is a defense for the employer.”<sup>109</sup> Although the comment by Senator Coats appears to clear the air, consider this dilemma: Is the “arranged” job swap “voluntary” as contemplated elsewhere in the WRFA,<sup>110</sup> or is it “employer-directed” as connoted in “tier two,” which contemplates the “cost . . . of *retraining or hiring employees or transferring employees from one facility to another.*”<sup>111</sup> To even hint at the latter is to seriously impact coworkers in order to accommodate religion, undoubtedly a serious Establishment Clause concern in terms of advancing religion above other secular interests. Admittedly, some of the WRFA hearings indicate that the former of the two options is likely intended.<sup>112</sup> Yet, even if transfers and swaps are voluntarily arranged, the employer is still being mandated to violate a bona fide seniority system in order to allow them; this too presents a serious Establishment Clause concern — one that will be discussed in greater depth in the next section.

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(B) other factors to be considered in making the determination shall include –

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

S. 1124, 105th Cong. § 2(a)(3)(A)-(B) (1997); *see supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>108</sup>Hearings, *supra* note 31, at 48 (statement of Lawrence Z. Lorber, employment discrimination lawyer with Verner, Liipfert, Bernhard, McPherson & Hand, Washington, D.C.).

<sup>109</sup>*Id.* at 62 (comment of Senator Coats).

<sup>110</sup>*See* S. 1124 § 2(b)(4); *see also supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>111</sup>S. 1124 § 2(a)(3)(B)(i) (*emphasis added*).

<sup>112</sup>*See* Hearings, *supra* note 31, at 60-64.

Meanwhile, consider further this scenario: The implication of Senator Coats's comment is that as long as an employee is replaced with another who can perform the same job, the essential functions of the accommodated employee's position are still able to be performed and, thus, there is no "significant difficulty or expense." Accordingly, if the replacement performs the functions at a lesser rate of productivity the employer must simply accept that fact under the WRFA. Although "tier two" contemplates calculation of loss of productivity, the "and" between tiers one and two suggests that fulfillment of "tier one" is a prerequisite to consideration under "tier two." In other words, it is not an "either/or" analysis. Thus, a productivity analysis would only be conducted if a job swap could not be made or if the essential functions of the accommodated employee's position could not be performed. As a result, the WRFA disproportionately values religious needs over secular concerns by permitting overall decreases in productivity—something which, over time, will impact co-workers in the form of decreased profits and stagnant wages. In short, just as opponents of the *de minimis* standard argued that the Court in *Hardison* had "read the adjective 'undue' out of [Title VII,]"<sup>113</sup> Congress, albeit unintentionally, is reading the exemption of "undue hardship" out of Title VII altogether. The closer that Congress comes to accomplishing this blunder, the greater the degree to which "reasonable" advances to "absolute," and the closer the WRFA comes to constitutional slaughter.

### 3. Seniority: Not What It Used to Be

The Workplace Religious Freedom Act threatens to violate the Establishment Clause by mandating violations of the bona fide seniority systems of collective bargaining agreements. In *Hardison*, the District Court held that the union's duty to accommodate Hardison's religious belief did not require it to ignore its seniority system.<sup>114</sup> In so holding, the District Court expressed concern that if it did not find violation of a seniority system to constitute an undue hardship, then accommodations of religious observances might impose "'a priority of the religious over the secular' . . . thereby [raising] significant questions as to the constitutionality of [Title VII] under the Establishment Clause of the First Amendment."<sup>115</sup> While not directly addressing the Establishment Clause implications, the Supreme Court did agree with the District Court's analysis by stating that "we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid [collective bargaining] agreement."<sup>116</sup>

Nevertheless, the Court supplemented that statement by implying that while it disfavored mandatory, employer-imposed shift-swapping, which would deprive other employees of their shift preference, voluntary shift-swapping among employees might be acceptable.<sup>117</sup> Therefore, the WRFA's command that violation of a bona

<sup>113</sup>See Schuchman, *supra* note 23, at 761 (citation omitted).

<sup>114</sup>*Trans World Airlines v. Hardison*, 432 U.S. 63, 69 (1977).

<sup>115</sup>*Id.* at 70 n.4 (citations omitted).

<sup>116</sup>*Id.* at 79.

<sup>117</sup>The Court stated that "there were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift

fide seniority system may not be a defense to an unlawful employment practice if the accommodation consisted of voluntary exchanges of shifts or jobs among employees might withstand scrutiny.<sup>118</sup> But, again, as is true of much of constitutional law, the question is one of *degree*. What of the WRFA provision that violation of a bona fide seniority system may not be a defense to a claim of unlawful employment practice if, in order to make the necessary accommodation, “an adjustment would be made in the employee’s work hours . . . that would not be available to any employee but for such accommodation?”<sup>119</sup> If hour and shift adjustments are not generally available to *any* employee, then this accommodation provides more than an incidental benefit to religion by breaking the collective bargaining agreement *only* for religiously-minded employees.

Theoretically, the answer depends upon whether one characterizes collective bargaining agreements as purely private contracts or as publicly regulated accords.<sup>120</sup> Generally, the Supreme Court has begun to favor accommodations that can be seen to lift governmentally-imposed burdens on religious practice or on religious institutions.<sup>121</sup> Still, the Establishment Clause concern is much greater, as expressed by the District Court in *Hardison*,<sup>122</sup> when the burden appears to be privately imposed. One scholar noted the difficulty of a court interfering with a strictly private contract:

If the terms of a labor contract serve to make the accord truly private then there is no government imposed burden that can be said to be lifted by an accommodation if religious impingement is caused by a substantive term of the agreement. Thus, the Supreme Court would not have been able to find a constitutionally viable way to exempt . . . Hardison when he was compelled to work on the Sabbath by the ostensibly neutral application of the collective bargaining agreement’s seniority system.<sup>123</sup>

Thus, if today’s Court chose to defer to the immediately preceding reasoning, there is a very grave possibility that it would view both a breach of a seniority system for voluntary job swaps, and a breach for the purpose of altering shift and hour assignments—not otherwise alterable for employees for nonreligious reasons—

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preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.” *Id.* at 81.

<sup>118</sup>See S. 1124, 105th Cong. § 2(b)(4)(B) (1997); *see also supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>119</sup>S. 1124 § 2(b)(4)(A).

<sup>120</sup>*See generally* Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LAB. L. 185 (1996) (discussing, generally, the difference between publicly and privately imposed burdens, the views of the Supreme Court with regard to accommodations that lift governmentally-imposed burdens, and how collective bargaining can be viewed as either a publicly or privately imposed burden).

<sup>121</sup>*Id.* at 190.

<sup>122</sup>*See supra* text accompanying note 115.

<sup>123</sup>Corrada, *supra* note 120, at 250.

as too great a deprivation of the private contractual rights of co-workers and a clearly unconstitutional “[prioritization] of the religious over the secular.”<sup>124</sup>

Conversely, if today’s Court were inclined to expand the view that “collective bargaining . . . lies at the core of our national labor policy,”<sup>125</sup> then it would adopt the view of collective bargaining as a type of governmentally-imposed burden to be lifted by the Workplace Religious Freedom Act. Consequently, the Court would scrutinize the WRFA under the analysis set forth in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, a case in which it upheld an exemption from Title VII’s religious nondiscrimination requirement for religious organizations.<sup>126</sup> In an opinion authored by Justice White, and joined by Chief Justice Rehnquist, and Justices Powell, Stevens, and Scalia, the Court expressed favor for accommodations made to lift governmentally-imposed burdens:

[The Court] has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.<sup>127</sup>

Although an *Amos*-tailored analysis would undoubtedly prove favorable to the collective bargaining provisions of the Workplace Religious Freedom Act, it is somewhat doubtful that a complete shift in the characterization of collective-bargaining agreements, from purely private to purely public, will occur any time soon.<sup>128</sup> In other words, “the NLRA’s encouragement of collective bargaining, specifically, should not be used as a shield when the statutory command, as well as overall Supreme Court interpretation, conceives of these agreements as being private in nature.”<sup>129</sup> Ultimately, it is just as likely as not that the Supreme Court will take a cautious approach to the WRFA’s interference with fairly-negotiated, neutrally applied collective bargaining agreements, therefore, finding Establishment Clause concerns too great to ignore.

#### VI. A “LEMON” BY ANY OTHER NAME . . .

Since the *Lemon* decision in 1972, the Court has, from time to time, strayed from *Lemon*’s three-pronged analysis, emphasizing that “[n]o *per se* rule can be framed”<sup>130</sup> for Establishment Clause jurisprudence and expressing its “unwillingness to be confined to any single test or criterion in this sensitive area.”<sup>131</sup> Despite frequent

<sup>124</sup>See *supra* note 115 and accompanying text.

<sup>125</sup>*Trans World Airlines v. Hardison*, 432 U.S. 63, 70 n.4. (1977).

<sup>126</sup>483 U.S. 327 (1987).

<sup>127</sup>*Id.* at 338.

<sup>128</sup>See Corrada, *supra* note 120, at 251.

<sup>129</sup>*Id.* at 252.

<sup>130</sup>*Lynch v. Donnelly*, 465 U.S. 668, 678 (1983).

<sup>131</sup>*Id.* at 679.

departures, however, the Court always seems to come back to the *Lemon* test for, as most humorously noted by Justice Scalia, the *Lemon* test is like a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried. . . .”<sup>132</sup>

Because the *Lemon* test figured prominently in both *Cummins* and *Thornton*, the two cases providing the most insight into the Court’s thinking on Title VII’s “reasonable accommodations,”<sup>133</sup> this author believes that the Court will revert to the use of the *Lemon* test to analyze any future amendment to Title VII challenged on Establishment Clause grounds.<sup>134</sup> However, this note would be deficient without discussion of proposed modifications to *Lemon*,<sup>135</sup> as well as its near abandonment by Justices who have attempted to exorcise that “ghoul” through development of the “neutrality,” “endorsement,” and “coercion” tests.

#### A. “Accommodationism” and “Neutrality”

Generally, *Amos* has been identified as one of the decisions signaling a change in the Court’s Establishment Clause jurisprudence—away from strict “separationism” to “accommodationism.”<sup>136</sup> The “separationist” view, which gave birth to the *Lemon* test, does not favor any form of government aid to religion, while the “accommodationist” view, as the name implies, is more receptive to governmental accommodations for religious interests.<sup>137</sup> One writer has grouped Justices Stevens, Souter, Ginsburg, and Breyer as “separationists” tending to uphold Establishment Clause challenges, and Chief Justice Rehnquist and Justices Scalia and Thomas as “accommodationists” tending to reject Establishment Clause challenges.<sup>138</sup> While Justices O’Connor and Kennedy are somewhat harder to categorize, some feel that they both swing toward the accommodationist end of the spectrum.<sup>139</sup> As will be shown, Justices O’Connor and Kennedy have exerted the greatest influence in reformulating the *Lemon* test.

In *Board of Education of Kiryas Joel Village School District v. Grumet*, Justice O’Connor suggested that a unitary approach to Establishment Clause jurisprudence should give way to the application of several, narrower, more precise tests.<sup>140</sup> While

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<sup>132</sup>Lamb’s Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (Scalia, J., concurring).

<sup>133</sup>See *supra* notes 40-58 and accompanying text.

<sup>134</sup>As Scalia quipped, “such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.” *Id.*

<sup>135</sup>See Miller, *supra* note 23, at 807-13.

<sup>136</sup>See generally *Id.* at 251-52; see also Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 696-97 (1992) (identifying *Amos* as a recent Supreme Court decision shifting doctrine to accommodationism).

<sup>137</sup>See Miller, *supra* note 23, at 809-11.

<sup>138</sup>See Sedler, *supra* note 66, at 1337.

<sup>139</sup>See generally Corrada, *supra* note 120, at 251-62.

<sup>140</sup>512 U.S. 687, 721 (1994) (O’Connor, J., concurring). In *Kiryas Joel*, the Court held that a New York statute creating a special school district following the boundaries of the



stating that abandonment of the *Lemon* test need not mean abandonment of the insights reflected in the test, or the case law applying the test, O'Connor felt that, ultimately, Establishment Clause analysis would benefit if freed from "*Lemon's* . . . rigid influence."<sup>141</sup>

Although not commanding a majority in *Kiryas Joel*, Justices Souter, Blackmun, Stevens, and Ginsburg caught O'Connor's wave of change by emphasizing a "neutrality" test in which the government should neither "favor . . . one religion over others nor religious adherents collectively over nonadherents."<sup>142</sup> Interestingly enough, while Blackmun supported the "neutrality" approach, he concurred separately to make clear that he "[remained] convinced of the general validity of the basic principles stated in *Lemon*, which have guided [the] Court's Establishment Clause decisions in over 30 cases."<sup>143</sup> Additionally, while expressing doubts about *Lemon*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, lacked confidence in any existing alternative, stating that "[t]o replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle."<sup>144</sup> The concurrence of Justice Kennedy did not directly address *Lemon* but expressed an air of general favorability for religious accommodation.<sup>145</sup>

Thus, the overall implication of *Kiryas Joel*, is as follows: Justices Souter, Stevens, Ginsburg, and O'Connor are likely to alter or abandon *Lemon* in the future; Justices Scalia, Thomas, and Chief Justice Rehnquist are more likely to retain *Lemon*. Justice Kennedy, as an "accommodationist" may also support an alternative to *Lemon*.<sup>146</sup>

Realistically, however, the degree of prominence of the "neutrality" test in any future challenge to a Title VII amendment like the WRFA will bear very little on the outcome of the case. Actually, the "neutrality" test is extremely similar to *Lemon*, prompting one commentator to articulate that it may serve nothing more than to demonstrate that the second prong of the *Lemon* test (*i.e.*, that the primary effect of the statute must neither advance nor inhibit religion) is the most important of the three prongs.<sup>147</sup> Thus, the analysis presented in this note, suggesting possible Establishment Clause violations under the second prong of *Lemon*, would not change much, if at all, under a "neutrality" test.

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Village of Kiryas Joel—a religious enclave of Satmar Hasidim Jews—violative of the Establishment Clause because it was "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion . . ." *Id.* at 690.

<sup>141</sup>*Id.* at 721 (O'Connor, J., concurring).

<sup>142</sup>*Id.* at 696 (citations omitted).

<sup>143</sup>*Id.* at 710-11 (Blackmun, J., concurring).

<sup>144</sup>512 U.S. at 751 (Scalia, J., dissenting).

<sup>145</sup>*Id.* at 722 (Kennedy, J., concurring). Justice Kennedy did, however, object to the fact that the New York legislature specifically drew the Kiryas Joel school district along religious lines. *Id.* at 729.

<sup>146</sup>See Corrada, *supra* note 120, at 263.

<sup>147</sup>See Miller, *supra* note 23, at 809.

Furthermore, despite the fact that some believe that an “accommodationist” majority exists on the Court at this time,<sup>148</sup> those accommodationists still believe that the Establishment Clause prohibits the favoring of one religion over others and the favoring of religion over nonreligion.<sup>149</sup> As has been stated throughout, this author feels that the Workplace Religious Freedom Act disproportionately favors religious adherents over those who are secularly oriented. Likewise, this author detects a subtle element in the Workplace Religious Freedom Act by which one or more religions are potentially favored over others; such is evident in the WRFA’s “two-tiered” system for determining what constitutes “significant difficulty or expense” and, thus, “undue hardship.”<sup>150</sup> One of the second-tier factors given consideration is the number of individuals who will need the particular accommodation to a religious observance or practice.<sup>151</sup> Disregarding other concerns regarding the application of factors in tiers one and two,<sup>152</sup> there is a significant danger (from a cost analysis point of view) associated with taking a cumulative, numbers-based “undue hardship” approach; one scholar has illustrated it in the following:

[A]n employer who had made an accommodation to employee X could deny the same accommodation to employee Y because this added expense would push the total cost of accommodation above the *de minimis* ceiling. Every religious employee who requires reasonable accommodation is entitled to some accommodation regardless of previous accommodations the employer has made for other employees. Otherwise, a religious employee’s accommodation would depend on the mere happenstance of the number of other employees who had beaten him to the request.<sup>153</sup>

Similarly, Establishment Clause concerns run high where the plausibility of an accommodation is measured, in part, by sheer numbers. For example, assume an employer employs sixty people in a factory; out of the sixty, twenty are Catholics

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<sup>148</sup>*Id.* at 811-12 (suggesting that if O’Connor adopted the neutrality test, then an accommodationist majority would exist with O’Connor, Rehnquist, Scalia, Thomas, and Kennedy, upholding Title VII as is and would likely uphold an amendment incorporating aspects of the 1996 EEOC guidelines).

<sup>149</sup>*See* 512 U.S. at 749 (Scalia, J., dissenting) (stating that he always believed that the Establishment Clause prohibits the favoring of one religion over others.); *see also* Agostini v. Felton, 521 U.S. 203 (1997) (upholding, by a majority consisting of Chief Justice Rehnquist and Justices O’Connor, Scalia, Thomas, and Kennedy, the constitutionality of New York City’s Title I program, in part, because the services were allocated on the basis of criteria that neither favored nor disfavored religion and because the services were available to all children who met the Act’s eligibility requirement, no matter what their religious beliefs).

<sup>150</sup>*See supra* note 107.

<sup>151</sup>*See supra* note 107.

<sup>152</sup>*See supra* text accompanying notes 107-113.

<sup>153</sup>*See* Miller, *supra* note 23, at 804. Miller advocates the adoption of an “individualizing” formula under which undue hardship would be calculated as “any yearly expenditure per employee that exceeded fifty percent of the employer’s annual net income divided by the average number of full-time employees. *Id.* at 801-802 (citing Steven B. Epstein, *In Search of a Bright Line: Determining When an Employee’s Financial Hardship Becomes “Undue” Under the Americans With Disabilities Act*, 48 VAND. L. REV. 391 (1995)).

requesting Good Friday off and two are Seventh Day Adventists requesting Saturday off for Sabbath observance. In all likelihood, the employer can afford to accommodate the two Seventh Day Adventists, because they only represent just over three percent of the total workforce. However, the employer is not going to be able to accommodate the twenty Catholics, which comprise thirty-three percent of the workforce. If sheer numbers dictate which accommodations are made, and which are not, then “minority” religions (those with a smaller membership) will nearly always be granted their accommodations and, thus, will be favored over religions with greater memberships whose members may request accommodations in larger groups.

Consider, further, the same employer, except that this time five Catholics are requesting Holy Saturday off and four Jewish employees are requesting the same Saturday off for Sabbath observance. Supposing that the employer had predetermined that on this particular Saturday he could only accommodate six employees without incurring an undue hardship, each group would be denied the accommodation altogether, whereas each separately would be eligible. Granted, neither is being “favored” over the other, but the system still lacks good sense. Therefore, if the sponsors of the WRFA want to avoid Establishment Clause violations and “restore the original intent of Title VII’s protections . . .”<sup>154</sup> then the WRFA must assure that each individual has his accommodation request reviewed separately.

### B. “Endorsement”

While Justice O’Connor’s discontentment with *Lemon* is evident in *Kiryas Joel*, she actually began streamlining the three prongs of the *Lemon* test into an “endorsement” analysis nearly two decades ago in *Lynch v. Donnelly*:<sup>155</sup>

Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device. . . . The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion. . . . [Likewise], what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.<sup>156</sup>

Four years after her opinion in *Lynch*, O’Connor reiterated her displeasure with *Lemon* in *Amos*: “The inquiry framed by the *Lemon* test should be ‘whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.’”<sup>157</sup> A majority of the Court brought O’Connor’s

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<sup>154</sup>See *supra* note 31 and accompanying text.

<sup>155</sup>465 U.S. 668, 691-92 (1983) (O’Connor, J., concurring). In *Lynch*, the Court held that the inclusion of a creche in a city Christmas display, which included a Christmas tree, a Santa Clause House, and seasonal banners, did not violate the Establishment Clause. *Id.* at 687.

<sup>156</sup>*Id.* at 689-92.

<sup>157</sup>Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring) (citing *Wallace v. Jaffree*, 472 U.S. 69, 76 (1985)).

“endorsement” analysis to the fore just two years after *Amos* in *Allegheny v. A.C.L.U.*<sup>158</sup> While employing the *Lemon* test in holding that a freestanding display of a nativity scene on the main staircase of a county courthouse violated the Establishment Clause, a majority in *Allegheny* acknowledged that the Court had, in recent years, begun to focus on whether governmental practices had the purpose or effect of endorsing religion.<sup>159</sup> Recognizing the difficulty in defining “endorsement,” and words of similar effect, the majority simply expounded: “The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’”<sup>160</sup>

Practically speaking, the “endorsement” test would not alter the foregoing Establishment Clause analysis regarding the Workplace Religious Freedom Act. Governmental “endorsement” of religion is evident in the WRFA’s higher threshold for “undue hardship” and its virtual mandate that employers acquiesce to employee-proposed accommodations. In short, regardless of whether *Lemon*’s second prong is applied, or a revised version of *Lemon*’s second prong emphasizing “endorsement,” this note concludes that the government, through the WRFA, takes an unconstitutional position in favor of religious belief.

### C. “Coercion”

Unsatisfied with the *Lemon* test, and blasting the “endorsement” test as “flawed in its fundamentals and unworkable in practice,”<sup>161</sup> Justice Kennedy authored his own opinion in *Allegheny* stressing the need to examine the coercive nature of government action:

The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clause. Banning all attempts to aid religion through government coercion goes far toward attainment of this object.<sup>162</sup>

Kennedy’s “coercion” analysis took center stage in *Lee v. Weisman*, as the Court held violative of the Establishment Clause the inclusion of prayers in a public middle school graduation ceremony because they compelled students to conform to a religious exercise:<sup>163</sup>

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<sup>158</sup>492 U.S. 573, 601 (1989).

<sup>159</sup>*Id.* at 592.

<sup>160</sup>*Id.*

<sup>161</sup>*Id.* at 669 (Kennedy, J., concurring in part, dissenting in part). Justice Kennedy rejected the endorsement test, in part, because he felt that many of the traditional and historical practices of the United States would not withstand scrutiny under its formula, e.g., The Pledge of Allegiance describes the United States as “one Nation under God;” the Supreme Court opens its sessions with the request that “God save the United States and this honorable Court.” *Id.* at 669-74.

<sup>162</sup>492 U.S. at 660.

<sup>163</sup>505 U.S. 577, 599 (1992).

The principle that government may accommodate the free exercise of religion does not supercede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.”<sup>164</sup>

Although the “coercion” test is largely confined to the school prayer cases out of which it developed, its application to the WRFA is not out of the question.<sup>165</sup> Still, the WRFA’s excessive mandates in support of religion would not be spared constitutional defeat under this test.

## VII. EVER ONWARD

Title VII, as currently structured and interpreted, is, unquestionably, a socially beneficial law; it recognizes the value of religious observance, while still respecting the Establishment Clause by minimizing the degree to which it orders employer-sacrifice in the name of religion. The Workplace Religious Freedom Act, conversely, distorts the meaning of “accommodation” and threatens to push employers into “absolute,” and unilateral acquiescence to religious interests. Ultimately, the cumulative effect of Establishment Clause concerns expressed herein make the Workplace Religious Freedom Act a sure target for constitutional challenge—which in terms of legislative scorekeeping means that WRFA is a loser before even getting out of the gates.

While the Workplace Religious Freedom Act has been debated since 1994,<sup>166</sup> some in Congress have openly admitted that “a substantial majority of employers are making good faith efforts to accommodate the provisions of [Title VII . . . and] one of the most egregious violations does not occur in private business but occurs within Government.”<sup>167</sup> Accordingly, this author suggests that, perhaps, Title VII is best

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<sup>164</sup>*Id.* at 587.

<sup>165</sup>*Engel v. Vitale*, 370 U.S. 421 (1962), laid the groundwork for Justice Kennedy’s development of the modern “coercion” analysis. In *Engel*, the Court struck down a daily school prayer program while emphasizing that, “when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Id.* at 431.

The “coercion” test is most appropriately used in cases like *Lee* and *Engel* where governmental action subjects a person to a particular religious thought or exercise at a particular time and place. See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) (upholding school district resolution allowing public high school students to choose student volunteers to deliver “nonsectarian, nonproselytizing invocations” at graduation ceremonies), *cert. denied*, 113 S. Ct. 2950 (1993); *Brown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997) (holding that a Georgia law mandating a moment of silence in public schools does not violate the Establishment Clause); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (holding that a Mississippi statute condoning student initiated prayer at assemblies and sporting events violates the Establishment Clause).

<sup>166</sup>See *supra* note 5.

<sup>167</sup>Hearings, *supra* note 31, at 4 (statement of Senator Coats).

left untouched. Frankly, Congress must share the sentiment, otherwise WRFA would have passed long ago, even in the face of business-lobby opposition.

Realistically, accommodations for religious practice can be achieved outside of the context of Title VII and this note concludes with a few creative ideas for a Congress looking to aid Sabbath and Holy Day observers.

#### A. *Look to the Family*

Few can dispute the fact that religion often forms the core of another very important concept—family. Families attend religious services together, they pray together at home, and they share in ceremonial rites and meals. Even families that do not observe a formal religion still may seek spirituality in life, still encourage members to live out certain morals and values, and may view shared time together to be just as fulfilling as any religious service. With these thoughts in mind, Congress should pursue a more broadly-based “Family Leave Policy.” The “Family Leave Policy” should be one having room enough to recognize religious observance in the scope of family life, but one that is removed from the “religiously-directed” Title VII and one which would be equally applicable to accommodate nonreligious family activity—a cherished American value in and of itself. The Workplace Religious Freedom Act recognizes the potential of such a “leave policy” by seeking to ensure that employers could not deny employees from taking leave of general usage for the purpose of accommodating religious observance or practice.<sup>168</sup> A limited “Family Leave Policy” could be carved out of the existing Family and Medical Leave Act (FMLA).<sup>169</sup>

Basically, the FMLA provides that any employer<sup>170</sup> must provide a minimum of twelve workweeks of leave<sup>171</sup> in any twelve-month period to any eligible employee<sup>172</sup>

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<sup>168</sup>S. 1124, 105th Cong. § 2(b)(3) (1997). Specifically, the WRFA states the following:

An employer shall be considered to [have committed an unlawful employment practice] by failing to provide such a reasonable accommodation for an employee if the employer refuses to permit the employee to utilize leave of general usage to remove such a conflict solely because the leave will be used to accommodate the religious observance or practice of the employee.

*Id.*

<sup>169</sup>29 U.S.C. §§ 2601-2654. (1998).

<sup>170</sup>The term “employer” means:

(i) any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year; (ii) includes (I) any person who acts directly or indirectly in the interest of an employer to any of the employees of such employer; and (II) any successor in interest of an employer; (iii) includes any “public agency,” as defined in section 203(x) of this title; and (iv) includes the General Accounting Office and the Library of Congress.

29 U.S.C. § 2611(4)(A) (1998).

<sup>171</sup>Leave may be unpaid except for a situation where the leave is being used by the employee for a serious health condition that makes the employee unable to perform the functions of his position. 29 U.S.C. § 2612(c) (1998). Generally, only leave which is taken for the care of a child, spouse, or parent with a serious health condition, or because the

for any of the following: 1) to care for a newborn child; 2) to care for a foster child; 3) to care for a spouse, child, or parent with a serious health condition; 4) because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.<sup>173</sup> Because one of the major purposes for providing the foregoing leave is “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity,”<sup>174</sup> it is natural to propose a fifth condition for leave (subsection (5) above) for “other compelling family reasons.” Under such an amendment, an employee would be permitted to borrow a maximum of ten days, from the previously defined twelve workweeks, in any twelve-month period; unlike other provisions in the FMLA, the ten days could only be used intermittently.<sup>175</sup> So as to relieve some of the burden to the employer, the leave would be unpaid, with no possible substitution of any paid leave or vacation time.<sup>176</sup> Furthermore, an employee would not be eligible to use the family leave during any week when they also sought to utilize paid leave or vacation time.

Admittedly, leave for any “compelling family reason” creates a potential for abuse; for example, an employee might assert use of a day in order to recover from a hang-over. However, potential abuse can be curbed by requiring the employee to give a minimum of fifteen days’ notice to his employer before using one of the days and also, when requested by the employer, to give written notice of the purpose for which the time is to be used.<sup>177</sup>

#### *B. Maximum Hours and Schedule Control*

As touched upon earlier, the Workplace Religious Freedom Act suggested alteration of collective bargaining agreements to allow for adjustment to an employee’s work hours in order to accommodate religious observance.<sup>178</sup> However, excessive tampering with collective bargaining agreements, in the context of Title VII, could present grave Establishment Clause concerns if the Court adopted a view of collective bargaining agreements as private.<sup>179</sup> Still maintaining that government

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employee has a serious health condition, may be taken intermittently. 29 U.S.C. § 2612(b)(1) (1998).

<sup>172</sup>Basically, the term “eligible employee” means an employee who has been employed 1) for at least 12 months by the employer with respect to whom leave is requested under subsection 2612 of this title; and 2) for at least 1,250 hours of service with such employer during the previous 12-month period. 29 U.S.C. § 2611(2)(A) (1998); *see also* 29 U.S.C. § 2611(2)(B) (1998) (setting forth exclusions).

<sup>173</sup>29 U.S.C. § 2612(a)(1)(A)-(D) (1998).

<sup>174</sup>29 U.S.C. § 2601(b)(1) (1998).

<sup>175</sup>*See supra* note 171-173.

<sup>176</sup>*See generally* 29 U.S.C. § 2612(d) (1998) (identifying unpaid leave and substitution of paid leave under the Family and Medical Leave Act).

<sup>177</sup>*See generally* 29 U.S.C. § 2612(e) (1998) (identifying notice requirement under Family and Medical Leave Act).

<sup>178</sup>*See supra* text accompanying note 119; *see also supra* note 62 (setting forth the full text of the Workplace Religious Freedom Act).

<sup>179</sup>*See supra* text accompanying notes 114-129.

should not mandate alterations in privately negotiated accords strictly in the name of religion, this author proposes an amendment to the Fair Labor Standards Act.<sup>180</sup> An amendment to the Fair Labor Standards Act could potentially benefit Sabbath observers, while again, removing the benefit from the religiously-directed Title VII analysis and placing the benefit in the hands of all workers—religious and nonreligious alike.<sup>181</sup>

Basically, the Fair Labor Standards Act requires employers to pay one and one-half times the regular rate of pay for an amount of time in excess of forty hours worked by an employee in one week.<sup>182</sup> The Fair Labor Standards Act regulates pay for the above hours because “Congress finds that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce . . . .”<sup>183</sup> A substantial amount of labor discord and employee discontentment could be relieved by allowing employees to exercise minimal control over scheduled work hours. For example, an amendment to the Fair Labor Standards Act could provide the following:

Upon request, no employee shall be denied scheduling control over one “twenty-four hour block of time” (of the employee’s choice) during the course of any week, provided that after determining the use or non-use of said twenty-four hour period, the employee is still able to fulfill a minimum forty hour workweek and provided that if any employee seeks to use general leave of any kind or vacation time in the same week, he loses the right to control over any twenty-four hour period.

What the above amendment accomplishes is an opportunity for employees, who happen to be members of two-job households, to coordinate “off-time” with a spouse or other family member and to prevent a workweek or weekend of overly burdensome scheduling. The amendment also gives Sabbath observers the flexibility to have a twenty-four hour period during any day of the week that they observe as religiously sacred, but it does not cater specifically to them, and, thus, avoids most of the Establishment Clause concerns previously raised with regard to Title VII and the Workplace Religious Freedom Act. Furthermore, the amendment takes into consideration inconvenience to employers who may only schedule shifts Monday-

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<sup>180</sup>29 U.S.C. §§ 201-219 (1998).

<sup>181</sup>This author is aware of the exemption from the Fair Labor Standard Act’s maximum hour requirements for employers and employees covered under certain types of collective bargaining agreements. *See* 29 U.S.C. § 207(b) (1998). I reiterate hesitation at infringing too greatly upon the rights of parties to bargain collectively; however, I put forward the notion that there is a grave difference between infringing upon those rights in the name of religion, and infringing upon those rights in the name of all employees. I make this point as a way of rectifying the suggestion that the amendment to the Fair Labor Standards Act proposed herein be applicable regardless of collective bargaining agreements to the contrary with my previous discussion of Establishment Clause concerns inherent in provisions of the Workplace Religious Freedom Act. *See supra* text accompanying notes 114-129.

<sup>182</sup>29 U.S.C. § 207(a)(1) (1998).

<sup>183</sup>29 U.S.C. § 202(a) (1998).



Friday by requiring that employees work a full forty hour week in order to exert control over one twenty-four hour period *i.e.* employees who traditionally work only Monday-Friday would be prevented from utilizing the Act to schedule an extra day off during the week. Ultimately, the amendment would promote a fair and flexible work atmosphere “without substantially curtailing employment or earning power,”<sup>184</sup> and without appearing to favor only religiously-dedicated employees.

#### VIII. CONCLUSION

Unquestionably, religious observance is an important aspect of the lives of many, and no one should be forced to sacrifice his/her beliefs. However, the Workplace Religious Freedom Act is sloppy, constitutionally ill-fated legislation that should be forgotten. Congressional time would best be spent revising existing labor legislation to provide broadly-based “Family Leave Policies” or to grant minimal scheduling control to employees; then, both programs can be voluntarily applied towards religious observances rather than unconstitutionally mandated.

GREGORY J. GAWLIK<sup>185</sup>

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<sup>184</sup>29 U.S.C. § 202(b) (1998).

<sup>185</sup>I dedicate this note to my loving parents and loyal sister whose undying strength and support have made my success possible. In addition, I wish to express my sincere appreciation to Professors Stephen R. Lazarus and Kevin Francis O’Neill, both of whom provided valuable advice and guidance.